

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case No.: J 469/11

In the matter between:

PRIDE MILLING COMPANY (PTY) LTD Applicant

and

FGWU 1ST Respondent

THOSE EMPLOYEED IDENTIFIED 2ND – 21ST Respondent
IN ANNEXURE “A” OF THE
SUBSTANTIVE APPLICATION

JUDGMENT

CAWE AJ:

Introduction

- [1] The matter first served on an urgent basis, before Acting Judge Shai on the 18th March 2011. He made an interim order that the First and Second Respondents are interdicted from proceeding with industrial action in terms of the certificate of outcome issued by the CCMA under case number MP1257 – 11 pending the finalisation of the review application under case number JR570 – 2011.
- [2] On the return date Judge Bhoola extended the Rule, by consent of the parties, to the date that the matter served before me.

- [3] At the beginning of the proceedings the Applicant's counsel, Ms Loise Charoux, asked for the Rule to be confirmed.
- [4] The Respondents' representative, Mr Ben Mtshali, opposed this request citing the fact that the Respondents want to embark on strike action pursuant to a valid certificate of non resolution that was issued by the CCMA.

Background facts

- [5] At the heart of the dispute between the parties is what is alleged by the Respondents as a unilateral change of employment conditions by the Applicant. The conditions that the Respondents regard as an issue relate to tea and lunch breaks that have allegedly been changed by the employer .i.e. the Applicant.
- [6] The Applicant operates a business in the agriculture industry.
- [7] The First and Second to Further Respondents referred a "unilateral change to terms and conditions of employment" to the CCMA on 16 February 2011. The alleged complaint that the First and Second to Further Respondents had was that the Applicant had unilaterally changed the tea breaks and lunch breaks without consulting the union on such change.
- [8] On 16 March 2011 the matter was set down before Commissioner Simon Malaza for a conciliation meeting. The Commissioner issued a certificate of outcome identifying the dispute as a "unilateral change to terms and conditions of employment section 64(4)."

- [9] On the same date that the certificate was issued the Respondents issued the Applicant with a strike notice that indicated that they would embark on what they called a protected strike on the 19th March 2011.
- [10] On 17 March 2011 the Applicant's attorney of record sent a letter to the First Respondent and advised the First Respondent that the Applicant will file a review in respect of the certificate of outcome issued by Commissioner Malaza on 16 March 2011. The Applicant's attorney of record also advised the First Respondent of the Applicant's intention to proceed with an urgent application on 18 March 2011 to prevent the industrial action on 19 March 2011.
- [11] The application was heard by Acting Judge Shai on the 18 March 2011. He issued the Order that appears at the beginning of the present judgment (paragraph 1, lines 2-6).
- [12] In the urgent application before Acting Judge Shai the Applicant sets out the grounds of review as follows:
- 12.1. The Commissioner failed to deal with the Applicant's jurisdictional challenges;
 - 12.2 the certificate of outcome is irregular;
 - 12.3 there was no unilateral change to the employees' conditions of Employment

12.4 The Applicant consulted with the Second to Further Respondents and agreed to the conditions as set out in Annexures “F”, “G”, “H” regarding meal intervals.

12.5 The application for review is being finalized under case number JR570-2011.

- [13] The Applicant persists on the grounds that are set out above and requests, on the basis thereof, the Court to stop the Respondents from going ahead with the threatened industrial action.
- [14] After the CCMA conciliation the Commissioner issued a section 64(4) certificate. The Applicant submits that First Respondent lodged a dispute regarding alleged unilateral changes to the conditions of employment in bad faith as there is no obligation on the Applicant to inform the First Respondent regarding the meal intervals of the Second and Further Respondents.
- [15] The Applicant further denies that there is a collective agreement between the parties as it had cancelled the agreement when it was allegedly breached by the Respondents. This is not disputed by the Respondents. They have taken the matter to Court to have it reversed.
- [16] The Respondent’s reaction, to the Applicant’s submission that it need not consult with the Union before changing the employees mealtimes, is that the employer should prove that it had reached an agreement with the employees before the implementation of such change.

- [17] On the Respondent's referral form the issue is clearly indicated in paragraph 3 as:

“The Respondent (Applicant in the instant matter) unilaterally changed the tea breaks and lunch breaks without consulting the union on such changes.”

- [18] To the extent that the referral form indicates that the matter before the CCMA was a section 64(4) application, I fail to understand the basis on which the Applicant contends that the certificate of outcome was irregularly issued as a ground of review that it relies on to have the industrial action by the Respondents stayed.
- [19] Applicant's counsel submitted that the Commissioner ought to have made a Ruling before issuing the outcome certificate in terms of Section 135 of the Labour Relations Act. Nothing in the present application or that before the CCMA suggests that a Ruling should have been made before the certificate was issued. I agree with the Respondents' representative that the certificate is regular and complies with the proper procedures and processes of the Labour Relations Act on the issuing of the certificate of outcome after conciliation.
- [20] The proceedings at which the Applicant raised a point in limine was case number 8066-10. An outcome report was issued after the conclusion of that matter which had nothing to do with the lunch and tea breaks. The matter was referred in terms of section 64(2) of the LRA. The Commissioner made a Ruling that the matter remained unresolved and an advisory award should be made in

terms of Section 135(3) of the LRA. That was duly done by Commissioner Simon Malaza on the 8th February 2011.

- [21] Commissioner Malaza conciliated the matter that has led to the present proceedings before Court. The matter under case number MP 8066/10 had nothing to do with the Second to Further Respondents in the instant matter. It was a refusal to bargain issue between the Applicant about a negotiating forum. None of the Respondents, other than the Union, in the instant matter are cited in the MP 8066/10 referral to the CCMA.
- [22] The instant dispute between the Applicant and the Respondent is in terms of Section 64(4). The Applicant misdirects itself in its contention that there should be a Ruling before a certificate can be issued by the CCMA. There is no provision for this in the CCMA Rules.
- [23] The Second and Further Respondents have the right to refer a dispute to the CCMA. This is not dependant on Union membership. They cannot be prejudiced by the dispute over the cancelled agreement between the Applicant and the Union. If the Union is left out of the picture the Second and Further Applicants would still have a dispute with the Applicant. The submission by the Applicant about not unilaterally changing tea and lunch breaks is not convincing in view of the Confirmatory affidavits disposed to by some of the Applicants in support of the First Respondent's Replying Affidavit.

[24] The Second and Further Respondents derive their rights from the LRA and section 23 of the Constitution. Section 23(1) and (2) provide that:

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike

[25] Subsection (2)(c) provides that every worker has the right to strike. This cannot be interpreted, as Applicant seems to suggest, to mean that workers can only strike if they are members of a Union in order to strike. The Labour Relations Act does not exclude strike action by workers who are not unionised.

[26] Section 64(1)(a)(i) of the LRA also confers the right to strike upon every worker as it provides:

- (1) Every employee has the right to strike and every employee has recourse to lock-out if -
 - (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –
 - (i) a certificate stating that the dispute remains unresolved has been issued;

[27] The question arises then that should strike action follow the issue of the certificate of non resolution by the Commissioner in the case before this Court. A reading of the Respondents Notice of Motion

seeking the dismissal of the order issued by Acting Justice Shai shows that the Respondents are not agitating for a strike at all costs. Paragraph 5 of the Notice of Motion referred to above suggests alternative relief by the Respondents.

[28] Paragraphs 5.1 and 5.2 are especially pertinent in this regard. They read as follows:

5. Alternatively, the above Honourable Court grant relief to the Respondents and order the Applicant in the following terms:
 - 5.1. The restoration of the lunch and tea breaks to where they were before the unilateral change occurred.
 - 5.2. The Respondents are paid for the lost time due to this unilateral change of lunch and tea breaks, calculated at the number of days and hours from the date of the implementation until the date of the order of this Honourable Court.

[29] The purpose of the referral was to have the lunch and tea breaks restored to their original times and duration by the Applicant. My view is that if that can be achieved without the employees going on strike then it is worth the parties' while to grant the alternative order.

[30] As the matter was brought on an urgent basis by the Applicant before Acting Judge Shai I am called upon to either dismiss or confirm the Rule Nisi issued on the 18th March 2011. The order that would deal with the situation effectively would be to discharge the Rule Nisi and order the Applicant to implement the provisions

of paragraph 5.1 and 5.2, with some amendment, of the Respondents Notice of Motion.

[31] The costs were reserved by Judge Bhoola when she extended the Rule Nisi. As I have decided to make an order in terms of paragraph 5.2 of the Respondents' Notice of Motion I hold the view that there is sufficient punishment for the Applicant as the losing party in the matter. I will therefore not award costs against the Applicant.

[32] In the premises I make the following order:

1. The Rule Nisi is discharged.
2. The Respondent is to restore the lunch and tea breaks of the Second and Further Respondents to where they were before the change thereto.
3. The Applicant is to pay the Second and Further Respondents for time lost due to the unilateral change of lunch and tea breaks, calculated on the number of days and hours from the date of implementation of the change to the date the 30th June 2011.
4. I make no order as to costs.

CAWE AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate L Charoux instructed by Yusuf
Nagdee Attorneys

For the Respondents: Ben Mtshali, a union FGWU official

Date of hearing: 26 May 2011

Date of Judgment: 04 August 2011

LABOUR COURT